Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JANELLE SUSAN SPAIN, an individual, and JENNA MARGARET SPAIN, a minor, by and through her Guardian ad Litem, JANELLE SPAIN,

Plaintiffs-Petitioners,

vs.

AETNA LIFE INSURANCE COMPANY,

Defendant-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an action brought by the surviving wife and child of a beneficiary under an ERISA plan and brought against, not the ERISA plan but the administrator of the ERISA plan, seeking damages only for wrongful death, subject to pre-emption by ERISA?

PARTIES TO THE PROCEEDING

Plaintiffs-Petitioners:

JANELLE SUSAN SPAIN, an individual, and JENNA MARGARET SPAIN, a minor, by and through her Guardian ad Litem, JANELLE SPAIN,

Defendant-Respondent:

AETNA LIFE INSURANCE COMPANY

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REFERENCE TO REPORT OF OPINION

The official report of the opinion delivered by the Ninth Circuit Court of Appeal in this action is:

Spain v. Aetna Life Ins. Co.,
11 F.3d 129 (1993)

GROUNDS FOR JURISDICTION

The judgment to be reviewed in this action was entered by the Ninth Circuit Court of Appeals on December 6, 1993. (The opinion is included in the Appendix at Tab A. The underlying order of the District Court is included in the Appendix at Tab B.)

No order respecting a rehearing or granting an extension of time within which to file the petition for a writ of certiorari has been made.

No reliance on Rule 12.3 is made.

This honorable Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. section 1254.

The Ninth Circuit Court of Appeals in this action determined that this

action arises under 29 U.S.C. section 1001, et seq., the Employee Retirement Income Security Act ("ERISA").

RELEVANT STATUTES

The statutes relevant to this action are 29 U.S.C section 1001, 29 U.S.C. section 1132, and 29 U.S.C. section 1144. The relevant ERISA statutes are included within the Appendix at Tab C.

STATEMENT OF THE CASE

A man died. He died because the administrator of his medical plan refused to authorize payment for the treatment that would have saved his

life. He died even though the treatment he needed was covered under the medical plan. The Ninth Circuit Court of Appeals has ruled that his wife and daughter cannot recover damages from the administrator of medical plan for the loss of their husband and father. The Ninth Circuit has ruled that their damages must go uncompensated.

The appellate court's determination was not based on an examination of the facts. The appellate court did not even get to the issue of causation. The appellate court ruled, as a matter of law, that this action was pre-empted by the Employee Retirement Income Security Act, 29 U.S.C. section 1001, et seq. That legislation, however, provides no remedy to a parent, spouse or child who has lost a loved one through the

negligence of an administrator of a medical plan.

Summary of Facts

This is a wrongful death action brought by the surviving wife and daughter of Steven Spain ("Steven"). Steven suffered from testicular germ cell cancer and required an autologous bone marrow transplant ("ABMT") as his only hope for cure. The ABMT procedure was covered under the group medical benefit plan provided by the employer of Steven's wife, plaintiff and petitioner JANELLE SPAIN. That plan was administered by defendant AETNA LIFE INSURANCE COMPANY ("AETNA"). AETNA approved two steps in the ABMT procedure but refused to authorize the third, crucial step in the procedure on the

grounds that the procedure was investigational or experimental for treatment of Steven's illness.

Only after Steven retained counsel and filed an action did AETNA belatedly agree to approve the provision of benefits. By that time, however, it was too late for Steven. Unfortunately, ABMT procedures can be performed successfully only during a very narrow window of time and by the time AETNA acknowledged its error and approved the procedure, Steven's window had closed. Although he finally finished the procedure, he subsequently died of his illness.

This wrongful death action is brought against AETNA for its negligent and wrongful delay in providing approval for payment of the covered benefits

under the medical plan administered by it. Petitioners allege that AETNA's delay proximately resulted in Steven's premature death.

This action was originally filed in the Superior Court of the State of California, County of Los Angeles. AETNA removed this action to the United States District Court, Central District of California on both the grounds that federal question and diversity jurisdiction existed.

ARGUMENT

Review of the decision of the Ninth Circuit Court of Appeals is sought under Supreme Court Rule 10.1 on the grounds that there are special and important reasons therefore and under Rule 10.1(c) on the grounds that the Ninth Circuit Court of Appeals has decided an important question of federal law which has not been, but which should be, settled by this Court.

A.

THE PRE-EMPTION OF A WRONGFUL DEATH ACTION WHICH IS BROUGHT BY ONE WHO IS NOT A PARTICIPANT OF AN ERISA PLAN, BROUGHT AGAINST ONE WHO IS NOT AN ERISA FIDUCIARY AND WHICH DOES NOT SEEK RECOVERY OF PLAN BENEFITS RAISES CRITICALLY IMPORTANT QUESTIONS REGARDING THE INTENT AND PURPOSE OF ERISA WHICH MUST BE ADDRESSED BY THIS COURT

1. Permitting pre-emption of a wrongful death action in the context of the facts presented here subverts the expressed and accepted purposes of ERISA and grants an unwarranted immunity unparalleled in the law without advancing the purposes of the pre-emption provisions.

As was explained by this Court in its decision in Massachusetts v. Morash, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989):

> "In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from the accumulated funds. [Citation.] To that end, it has established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the

plan administrator."

As this Court further noted, Congress's express intention in enacting ERISA was "to promote the interests of employees and their beneficiaries in employee benefit plans,. . . and to protect contractually defined benefits." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989).

It is clear that ERISA properly applies to an action for recovery of plan benefits. However, once the factual scenarios deviate from that simple bright-line test, the issue becomes more complex and involved. This case presents a legal question as to the issue of whether pre-emption should be allowed where pre-emption would not

advance, but would actually subvert, ERISA's purposes.

In contrast to ERISA's overall purpose, ERISA's pre-emption provisions, 29 U.S.C. 1144, were designed to afford "employers the advantages of a uniform set of regulations governing plan fiduciary responsibilities and governing procedures for processing claims and paying benefits." Memorial Hospital System v. Northbrook Life Insurance Company, 904 F.2d 236, 245-246 (1990), citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9-11, 107 S.Ct. 2211, 2216-2217, 96 L.Ed.2d 1 (1987).

The circuit courts have struggled with the tension created by the conflict between fulfilling ERISA's overall purpose and protecting the interests served by the pre-emption clause. In

this case, the Ninth Circuit Court of Appeals resolved that conflict in favor of pre-emption.

That determination, however, actually subverts, and nearly destroys, ERISA's overall purpose while failing to advance the objective of the pre-emption clause. Conversely, a finding that pre-emption does not apply in this context would materially advance ERISA's overall purpose while having no adverse impact on the regulatory or administrative functions involved.

a. Granting the unprecedented immunity of ERISA pre-emption in a wrongful death case subverts and defeats ERISA's overall purposes.

Application of a pre-emption rule as employed by the Ninth Circuit in this

case would allow plan administrators and insurers who issue medical insurance policies to ERISA plans to escape liability for actions based on claims for wrongful death. As a result of that immunity, it would be sound business practice for an insurer or plan administrator to delay payment of benefits, to wrongfully deny benefits and to engage in other deleterious tactics in order to decrease its financial obligations. Like the criminal who fears no reprisal from the State for his or her tortious or criminal acts, pre-emption of a wrongful death action assures that there is similarly no "downside" or disincentive to prevent an insurer or plan administrator from committing tortious, and even fatal, acts. This creates a

system of law that actually encourages abuse.

For example, if the only damages recoverable under ERISA are the contractual benefits denied by the plan through its insurer or its administrator, and even those damages can be avoided by simply waiting until the insured dies, it serves the insurer's or administrator's interest to contest the rights of the insured, deny coverage and force the insured to curtail medical treatments, even when the benefits are unambiguously provided under the medical plan. In cases of catastrophic illness, it even behooves the insurer or administrator to deny life-saving treatments so that the plan participant will die and relieve the insurer or administrator of any further

obligation to provide continuing benefits. If the plan participant cannot pay for the treatment himself or herself, then *no* damages are incurred at all because no plan benefits are payable and the insurer escapes "scot-free."

Thus, pre-emption of wrongful death actions, for which there is no remedy under ERISA, actually provides an ***incentive*** to an insurer or a plan administrator to ***wrongfully*** deny plan benefits where the benefit sought is a life-saving treatment. This, of course, completely subverts ERISA's overall purpose of "protect[ing] contractually defined benefits." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989).

b. Refusing to permit pre-emption in such a case does not defeat the pre-emption clause's purpose in providing uniform regulations for ERISA plans.

Conversely, imposition of liability on in this context does not implicate Congress's concerns in seeking to establish a regulatory framework for protection of ERISA fiduciaries. Indeed, the damages to be paid in this action are not assessed against the plan. They are assessed only against the administrator. Similarly, assessment of damages against the administrator does not affect the ongoing administration of the plan because the liability is based on the administrator's own, independent liability for its own, independent

conduct in a distinct, circumstance.

As the court in Memorial Hospital, 904 F.2d at 250 noted:

> "This conclusion [that the preemptive scope of ERISA is neither all-encompassing nor unlimited] follows as a matter of common sense from the fact that ERISA plan members and managers are bound to engage in myriad transactions that Congress never considered when it drafted section 514. A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of

any purely local transaction."

Thus, refusing to pre-empt wrongful death actions such as this one would not force ERISA plans, their administrators or their insurers to adjust to local regulations and would not disturb the uniform regulatory system applying to the administration of the plan.

As noted by the court in Memorial Hospital System v. Northbrook Life Insurance Company, 904 F.2d at 246, the uniform regulatory purpose of ERISA is not implicated where the recovery under the action at issue in no way expands the rights of the plan participant to receive benefits under the terms of the plan.

A wrongful death action cannot, by definition, *expand* the benefits

otherwise owed. Rather, it seeks damages for the death resulting from the failure to pay benefits that were, in fact, ***already*** owed. No new regulatory or administrative requirements are imposed. Thus, imposition of liability for wrongful death does not subject administrators to conflicting laws. Rather, the administrator or insurer is protected from potential liability by doing what it is already required and obligated to do.

2. The "gap in remedies" caused by pre-emption of wrongful death cases is properly addressed by this Court in establishing the proper parameters to be applied in effectuating the pre-emption provisions.

In finding that the wrongful death action alleged in this case was pre-empted by ERISA, the Ninth Circuit quoted the Fifth Circuit's decision in Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1332 (5th Cir. 1992), cert. den., ___ U.S. ___, 113 S.Ct. 812, 121 L.Ed.2d 684 (1992) for the proposition that the "gap in remedies" caused by the pre-emption of wrongful death claims is an issue which must be addressed by Congress. That, however, is simply a failure by those courts to properly analyze and apply the decisions of this

Court in regard to the appropriate application of the pre-emption provisions.

In examining the breadth of the pre-emption clause, the court in Memorial Hospital, supra, 904 F.2d at 244 noted that while this Court has held that the pre-emption clause is to be liberally interpreted, "[a] purely semantic approach cannot be taken to its logical extreme, however." Similarly, the same court noted in Sommers Drug Stores Co. v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1465 (5th Cir. 1986) that "the Supreme Court has indicated that it will not extend the 'relate to' language to its outer limit."

Thus, given the factors which have been developed by this Court and the

appellate courts in determining the scope and application of the "relates to" language of the pre-emption provisions, it is well within this Court's power and interest to apply those parameters to the wrongful death issue and, to properly conclude that a wrongful death action in the context of the facts presented, affects the plan in "too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901, n. 21, 77 L.Ed.2d 490 (1983).

In a wrongful death action such as that presented here, the effect on the plan is "too tenuous, remote or peripheral" to justify pre-emption for several reasons. First, the parties to

the action are not the ERISA principals. Numerous appellate courts have concluded that where the state law cause of action at issue does not involve the principal parties to the ERISA transaction, pre-emption is not warranted. Memorial Hospital, supra, 904 F.2d at 249-250; Sommers Drug, supra, 793 F.2d at 1467-1468; Perkins v. Time Insurance Co., 898 F.2d 470, 473-474 (5th Cir. 1990). In Perkins v. Time Ins. Co., 898 F.2d 470, 473, (5th Cir. 1990) the court noted that:

> "A state law claim ... which does not affect the relations among the principal ERISA entities (the employer, the plan fiduciaries, the plan, and the beneficiaries) as such, is not preempted by

ERISA."

This is just such a state law claim. This action does not affect the relations among the employer, the plan or the plan beneficiaries since none of those entities are parties to this action. As noted by the court in Memorial Hospital:

> "In Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1467-68 (5th Cir.1986), cert. denied, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987), we determined that the most important factor for a court to consider in deciding whether a state law that

affects an employee benefit plan 'is too tenuous, remote, or peripheral a manner to be preempted' is whether the state law affects relations among ERISA's named entities. '[C]ourts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities--the employer, the plan, the plan fiduciaries, and the beneficiaries-- than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan.'" (Memorial Hospital,

supra, 904 F.2d at 249.)

Because the appellants are not suing as plan beneficiaries or participants, they are non-ERISA outside parties and California's state law permitting wrongful death damages is therefore "too tenuous, remote or peripheral" to support ERISA pre-emption.

Second, the liability sought to be imposed in this case is not derivative of the ERISA plan and does not "relate to" the ERISA plan in the sense that term is used in the pre-emption context. AETNA owed its own primary, independent duty of care to the petitioners, separate and apart from its duty under the Plan to actually authorize payment of the benefits. (California Code of

Civil Procedure section 377.60; Witkin, Cal.Summary, 9th Ed., Torts, Vol. 6, section 1197 [California's wrongful death statute creates new cause of action based on heirs' own independent pecuniary injury suffered as the result of the loss of a relative].) AETNA breached that duty of care and caused the death of Steven Spain. AETNA should properly be subjected to liability for its breach of that duty of care. As this Court held in Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), ERISA plans may properly be sued in "run of the mill" tort cases.

Third, pre-emption is not appropriate because pre-emption would strip the survivors of any ability to obtain damages for the wrong. In

determining whether an employees' action to rescind a promised benefit plan was subject to ERISA pre-emption, the court in Perry v. P*I*E* Nationwide, Inc., 872 F.2d 157 (6th Cir. 1989) examined and followed the analysis set forth in Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981), cert. denied, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384:

> "Dependahl held that preemption of state common law claims, such as tortious interference, applies when (1) Congress has indicated an intent to "occupy the field," and (2) ***Congress has provided a remedy for the alleged wrong.*** 653 F.2d at 1215. See, to this same effect, Ogden v.

Michigan Bell Telephone Co., 571 F.Supp. 520, 523 (E.D.Mich. 1983). Resolution of the second of these Dependahl standards depends upon an interpretation of 29 U.S.C. section 1132, the ERISA civil enforcement provision. Section 1132(a)(3) provides that a civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions

> of this subchapter or the terms of the plan. . . . We are disposed, however, toward the reasoning of Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981), that ***preemption should apply to a state law claim only if Congress has provided a remedy for the wrong or wrongs asserted.***" (Emphases added.)

This Court can properly address and apply those principles to the pre-emption issue presented by this case and can, and should, establish - clearly and unequivocally - that the wrongful death

of a person will not be allowed to fall through the "gap in remedies" cause by the improper application of the pre-emption provisions of ERISA.

CONCLUSION

This case makes it heart-rendingly clear that Congress's expressed intent to protect a beneficiary's interest in the benefit plan and the protection of the beneficiary's contractually defined benefits cannot be fulfilled where a plan administrator can wrongfully deny benefits, thereby causing the beneficiary's death, yet escape all liability for that wrongful conduct. At some point, the "careful balance" in the "bargain" struck by Congress between protecting the beneficiary's interests and providing the plan with a

comprehensive and consistent regulatory framework within which to work (see Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d at 249) must tip in favor of protecting the right of the beneficiary to live and the right of the beneficiary's nearest and dearest to enjoy the care, comfort and society of their loved one including, ultimately, the right to recover damages for the wrongful death of that loved one caused by the tortious conduct of the plan administrator. Where the protection of the plan's or the administrator's "regulatory function" overcomes the maintenance of the beneficiary's life, ERISA has been warped and skewed far beyond its original express intent and purpose. Balance must be restored.

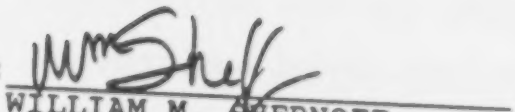
These issues must now be addressed

by this Court and it is respectfully requested that the petition be granted and this matter be reviewed.

Dated this 4th day of March, 1994 at Claremont, California.

Respectfully submitted,

SHERNOFF, BIDART & DARRAS

By: 

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APPENDIX

APPENDIX

TAB	DOCUMENT
A	Opinion of the Ninth Circuit Court of Appeals entered on December 6, 1993, officially cited as Spain v. Aetna Life Ins. Co., 11 F.3d 129 (1993).
B	Minute Order of the United States District Court granting Motion to Dismiss, dated January 21, 1993.
C	Relevant Statues, including 29 U.S.C section 1001, 29 U.S.C. section 1132, and 29 U.S.C. section 1144